

Mauro v Consolidated Edison of N.Y.

2020 NY Slip Op 30344(U)

February 6, 2020

Supreme Court, New York County

Docket Number: 190382/2017

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

MARIA MAURO, Individually, and JOSEPH MAURO, III, and DEAN MAURO as Special Administrators and Co-Administrators to the Estate of JOSEPH MAURO, JR., Deceased,

INDEX NO. 190382/2017
MOTION DATE 01/29/2020
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

Plaintiffs,

-against-

CONSOLIDATED EDISON OF NEW YORK, et al.,

Defendants.

The following papers, numbered 1 to 7 were read on this motion to pursuant to CPLR §3212 for summary judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7</u>

CROSS-MOTION YES NO

Upon a reading of the foregoing cited papers it is ORDERED that defendant Consolidated Edison of New York's (hereinafter "Con Ed") motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, is denied.

Plaintiffs' decedent, Joseph Mauro, Jr. (hereinafter "decedent"), was diagnosed with malignant pleural mesothelioma on October 19, 2017 and passed away on April 10, 2018 (Opp. Exhs. 1 and 4). Decedent alleged he was exposed to asbestos in a variety of ways. He alleges exposure from approximately 1970 through November 1976 at various Con Ed sites while employed by a subcontractor, Michael J. Torpey.

Decedent was deposed on January 16, 17 and 18, 2018. His de bene esse deposition was conducted on January 25, 2018 (Mot. Exhs. D and E and Opp. Exhs. 2 and 3). He testified that in 1961 he got his oilers license and started working with the Operating Engineers Union Local 15. He stated that in 1966 he got his license to operate higher powered heavy-duty level equipment - including two hundred or two hundred fifty foot boom cranes - and started to find work through the Operating Engineers Union Local 14. Starting approximately in 1970 through November of 1976 he was hired by a union employer, Michael J. Torpey, Inc. (hereinafter "Torpey") to perform backhoe work (Mot. Exh. D pgs. 48-49, 62-64).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Torpey was a subcontractor who got work from Con Edison performing new installations outdoors. Decedent stated that Torpey had multiple foremen that worked on the jobsites and they changed regularly. He testified that the foremen directed decedent's work, but the entire site was under the control of Con Edison. He claimed that Con Edison told his Torpey foreman what to do. He recalled that periodically he would see a Con Ed representative, a man in a blue hat holding a clipboard performing inspections or talking to a foreman. He stated that the Con Ed representative controlled the work sites and wanted the work to be well done because if something went wrong Con Ed would get the call, not Torpey (Mot. Exh. D pgs. 146-149, 154-156, 229-230 and 235-237 and Mot. Exh. E, pgs. 33-37).

Decedent testified that Con Ed would use its own trucks and supply the asbestos containing conduits (which he also referred to as asbestos ducts) at the various sites and he would unload them from the trucks. Decedent described his work for Torpey at Con Ed sites as follows: "he would dig a one hundred and fifty or two hundred foot trench using a backhoe; then he would leave the cab of his equipment and go to the side to help the laborers put the asbestos containing conduit into the bucket and lay them out; he waited for the laborers to install the asbestos containing conduit, and then he would backfill the trench." He stated that he would typically leave the cab doors of his equipment open to create a breeze because it would get hot (Mot. Exh. D, pgs. 65-67, 213, 226-229, and 251-252 and Mot. Exh. E, pg. 32).

Decedent testified that periodically, when the laborers were shorthanded, he would help out with the installation of the asbestos containing conduits by picking up pieces to bring down to the carpenter and helping to mark them; he would keep the asbestos conduit pieces steady so the carpenter could cut them, and then put them back into the bucket. Decedent testified that when the carpenter cut the pieces, even if he turned his head, he would still get dust blown into his face and that he breathed in the dust. He stated that on average it would take four minutes for the carpenter to make one full cut. Decedent claimed he also inhaled dust from wind blowing at the raised bucket as he was trying to dump the debris into a truck (Mot. Exh. D, pgs. 150-153, 235-229, and 239-240 and Mot. Exh. E, pgs. 28-31).

Decedent recalled using a Drott 4+1, which had a bucket in the front that would open up like a crane, and a Dynahoe. He testified that he would also be called-in to clean up the asbestos containing conduits. He stated that he would hit and run over the asbestos containing conduits with the Drott 4+1, to crush them into little pieces, which created a lot of dust. Decedent testified that after crushing the asbestos containing conduits he picked up the little pieces with his Drott 4+1 or, with a laborer, he would get a broom and shovel to throw pieces into the bucket and then dumped them into a truck. Decedent stated he was exposed to asbestos from breaking and cutting the asbestos containing conduits; helping the laborer with the clean-up using a broom to sweep up the dust created from the asbestos containing conduits; throwing the pieces into the bucket of the Drott 4+1; loading the asbestos containing conduits onto the truck; and taking the asbestos containing conduits off the Con Ed trucks (Mot. Exh. D, pgs. 68-69 and 72-73). Decedent testified that he followed the same procedures with asbestos containing conduits or ducts when working with round asbestos cement pipes that were also delivered to the Con Ed job sites, and that the dust from those pipes got close enough for him to breathe in (Mot. Exh. D, pgs. 149 and 238-244).

Decedent described the asbestos containing conduits or ducts as light gray, smooth powdery and square on the outside, but round on the inside for the wires to go through. The asbestos containing conduits or ducts came in different sizes, ranging from one foot to four feet for straight pieces, and there were also bends and couplings. He stated that the asbestos containing conduits could be put together to make bends at the corners that were at forty-five, ninety or twenty-two and a half degree angles. Decedent did not know the name of the manufacturer of the asbestos containing conduits or ducts (Mot. Exh. D, pgs. 70-73, 139-142 and 231-232). Decedent also recalled working with round grayish-white asbestos cement pipes that had a rough texture and a diamond pattern, that ranged in size either three, six, or ten feet (Mot. Exh. D, pgs. 232-233 and Mot. Exh. E, pgs. 22-25).

Plaintiffs commenced this action on December 15, 2017 alleging the causes of action asserted in their Standard Complaint No. 1. The Summons and Complaint was amended multiple times to add new parties. On March 13, 2018 Con Ed commenced a third-party action against Torpey. The Fifth Amended Summons and Complaint dated June 3, 2019 modified the complaint to substitute the estate, include a cause of action for wrongful death and incorporate the Levy Konigsberg, LLP's Standard Asbestos Complaint for Wrongful Death and Survival Damages filed on May 11, 2018 (Mot. Exh. A). Con Ed's Acknowledgement of Service of the Summons and Complaint is dated December 22, 2017 (Mot. Exh. B).

Con Ed seeks an Order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 89 NY 2d 833, 675 NE 2d 458, 652 NYS 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 N.Y. 2d 525, 571 NE 2d 645, 569 NYS 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD 2d 583, 677 NYS 2d 136 [1st Dept. 1998]); Martin v Briggs, 235 AD 2d 192, 663 NYS 2d 184 [1st Dept. 1997]).

Con Ed argues that it did not supervise or control decedent's work and that summary judgment dismissing plaintiffs' Labor Law §200, and common law negligence claims is warranted. Con Ed argues that at most it exercised a right of general inspection and that this is not a basis to find common law negligence. Con Ed provided no copies of contracts or evidence other than decedent's testimony on this motion for summary judgment seeking dismissal of plaintiffs' Labor Law §200 claims.

Con Ed claims that the decedent provided conflicting testimony about who supervised and controlled his work. Con Ed relies on decedent's initial testimony that only his foreman from Torpey supervised his work (Mot. Exh. D, pgs. 61, 145-146, 148,150-151 and 154). Decedent subsequently testified that Con Edison told his foreman from Torpey what to do, inspected the work and controlled the work sites (Mot. Exh. D, pgs. 146-149, 154-156, 229-230 and 235-237). Decedent's conflicting testimony presents a credibility issue to be determined by the trier of fact and fail to

make a prima facie case to grant Con Ed summary judgment (See Luebke v. MBI Group, 122 AD 3d 514, 997 NYS 3d 379 [1st Dept. 2014] citing to Vazieiyan v. Blancato, 267 AD 2d 152, 700 NYS 2d 22 [1st Dept., 1999]).

Alternatively, Labor Law §200 codifies a general contractor's common-law duty of care to provide construction site workers with a safe place to work (Comes v. New York State Electric and Gas Corp., 82 NY 2d 876, 631 NE 2d 110, 609 NYS 2d 168 [1993]). A Labor Law §200 claim on the manner and means of work performed requires that "the party charged with that responsibility must have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Louis N. Picciano & Son, 54 NY 2d 311, 445 NYS 2d 127, 429 NE2d 805 [1981] and McGarry v. CVP 1 LLC , 55 AD 3d 441, 866 NYS 2d 75 [1st Dept., 2008]). Labor Law §200 liability will attach if the party to be charged (Con Ed), controls the work performed through issuance of specifications affirmatively directing contractors in the means and methods of applying that party's required asbestos containing products, monitored the work performed for compliance with the specifications, and retained the capacity to exclude or stop work if a dangerous condition arose (In re New York Asbestos Litigation (Brown), 146 AD 3d 461, 49 NYS 3d 1 [1st Dept. 2017]).

Plaintiffs in opposition provide copies of Orders and Modifications of Agreements from the relevant period between Con Ed and Mr. Torpey (Opp. Exh. 6), Con Ed's Purchase Orders from John E. Potente & Sons (Opp. Exh. 7) and Con Ed's Purchase Orders and Special Products Inquiry from Kennedy Electrical Supply Corp. (Opp. Exhs. 8 and 9). They argue that the Orders and Modifications, and the Purchase Orders demonstrate that Con Ed purchased the asbestos containing Transite conduits or ducts and asbestos containing cement pipes identified by decedent (See Opp. Exh. 12 and 13, Mot. Exh. D, pgs. 231-235 and 251-254). The Purchase Orders and Torpey Orders establish that during the relevant time period of 1970 through 1976, Con Ed Ordered asbestos containing pipe, asbestos cement conduit in concrete envelopes and transite conduits (Opp. Exhs. 6,7, 8 and 9).

The Modification Order approved on August 23, 1973, specifically states:

"Contractor shall not perform any work covered by the pay items listed herein unless the company inspector has been notified or unless otherwise authorized by the division manager or his designated representative. Failure to comply with this procedure will result in non-payment for work done under the listed pay items. All other prices terms and conditions of original order remain unchanged" (Opp. Exh. 6).

Plaintiffs argue that the language of the Orders and Modifications (Opp. Exh. 6), together with the decedent's deposition testimony, demonstrates that Con Ed controlled the work performed by Torpey's employees at the worksite, or at the very least raises issues of fact.

"It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d

499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011], Almonte v. 638 West160 LLC, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016] and Doumbia v. Moonlight Towing, Inc., 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018]).

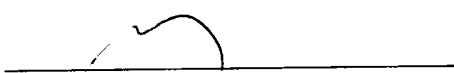
Plaintiffs' evidence together with the decedent's conflicting deposition testimony raises issues of fact and credibility issues. Construing the evidence in the light most favorable to the plaintiffs as the non-moving party, denial of summary judgment on the Labor Law § 200 claim is warranted. There remain triable issues of fact as to whether Con Ed ordered asbestos containing materials used at the decedent's work sites, specified and controlled the means and methods of decedent's work such that common law negligence and Labor Law §200 liability may be reasonably inferred.

Con Ed also seeks summary judgment on plaintiffs' Labor Law §241(6) claims. Con Ed argues that plaintiffs predicate this claim on the Industrial Code § 23-3.2(d) which applies to demolition sites and is inapplicable in this case which factually involves installation, repair and maintenance. Con Ed states that the plaintiffs' Standard Complaint (Fifth Cause of Action) alleges Con Ed violated Labor Law Code § 23-3.2(d) and Industrial Code Sections §§ 12-1.4, 12-1.5, 12-1.6 and 23-3.2(d) (Browne Aff. In Support, "Procedural History," para. 4).

Con Ed's motion papers do not annex the May 11, 2018 Levy Konigsberg, LLP Standard Asbestos Complaint which allegedly cites to Industrial Code § 23-3.2(d) in support of plaintiffs' Labor Law § 241(6) claim (See Mot. Exh. A). The May 11, 2018 Levy Konigsberg, LLP Standard Asbestos Complaint For Wrongful Death and Survival Damages cites to Industrial Code "§§ 12-1.4, 12-1.6, 12.3-1, 23-1.7, 23-2.1, 23-1.5, 56-5.1 and 5.2." (See Index Number 782000/2017, NYSCEF Doc. No. 115, fifth cause of action - "Liability for Contractors and Sub-Contractors," page 17, para. 75). The same Industrial Codes sections are cited for violations of Labor Law §§200 and 241(6) (See Index Number 782000/2017, NYSCEF Doc. No. 115, fourth cause of action, page 14, para. 62). There is no reference or citation to Industrial Code § 23-3.2 (d) in plaintiffs' standard complaint, and Con Ed fails to address the remaining alleged Industrial Code violations. Con Ed does not make a prima facie case, warranting denial of summary judgment on plaintiffs' Labor Law §241(6) claim. There is no need to address the sufficiency of plaintiffs' opposition papers.

Accordingly, it is ORDERED that that defendant Consolidated Edison of New York's motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, is denied.

ENTER:



Dated: February 6, 2020

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE